

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 KIMBERLEE SUE JONES,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN,
14 Acting Commissioner of Social Security,

15 Defendant.

CASE NO. C15-1234 JCC

ORDER ADOPTING R&R

16 This matter comes before the Court on Defendant's Objections to the Report and
17 Recommendation (Dkt. No. 17). The Honorable Brian A. Tsuchida, United States Magistrate
18 Judge, issued a Report and Recommendation ("R&R") (Dkt. No. 16) advising the Court to
19 REVERSE the Commissioner's Final Decision and REMAND the case for further administrative
20 proceedings under sentence four of 42 U.S.C. § 405(g).

21 After reviewing Defendant's objection, the parties' briefing, and the record, the Court
22 finds oral argument unnecessary and hereby ADOPTS the R&R and REMANDS the case for
23 further administrative proceedings for the reasons explained herein.

24 **I. BACKGROUND**

25 **A. Factual Background**

26 Plaintiff Kimberlee Sue Jones is a 54-year-old widow who has a high school diploma and

1 additional secretarial training, and has worked as a cashier, housecleaner, waitress, and Navy
 2 yeoman. (Dkt. No. 9-2 at 59, 60, 204; Dkt. No. 9-6 at 9.) She was last employed in 1990. (Dkt.
 3 No. 9-6 at 27.) In January 2012, she applied for benefits, alleging disability as of October 2011.
 4 (Dkt. No. 9-2 at 35, 58; Dkt. No. 9-5 at 23, 24.) Plaintiff qualifies for disability benefits if she
 5 meets the criteria of section 202(e) of the Social Security Act and was eligible during the
 6 statutory period, October 19, 2011 to April 30, 2012.¹ (Dkt. No. 9-2 at 35.)

7 In determining whether Plaintiff was disabled during the qualifying period, the
 8 Administrative Law Judge (“ALJ”) considered Dr. Chad Marion’s medical opinion, the opinion
 9 at the center of the present dispute. (Dkt. No. 9-2 at 39.) The ALJ gave little weight to Dr.
 10 Marion’s opinion, finding that it was internally inconsistent and outside the relevant time period.
 11 (Dkt. No. 9-2 at 44.)

12 **B. Procedural History**

13 On August 8, 2015, after the ALJ issued an unfavorable ruling and the Appeals Council
 14 declined review, Plaintiff filed a complaint under 42 U.S.C. § 405(g) and 5 U.S.C. §706 to
 15 review the final decision of Defendant, Carolyn W. Colvin, Acting Commissioner of Social
 16 Security. (Dkt. No. 3.) On February 10, 2016, Judge Brian Tsuchida issued a Report and
 17 Recommendation advising the Court to REVERSE the Commissioner’s Final Decision and
 18 REMAND the case for further administrative proceedings. (Dkt. No. 16.) Defendant timely
 19 objected to the R&R. (Dkt. No. 17.)

20 **II. DISCUSSION**

21 **A. Standard of Review**

22 When a party makes a specific objection to a portion of a magistrate judge’s R&R, a

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 25 ¹ A claimant may be eligible if she is the widow of a deceased worker, has attained the age of 50,
 26 is unmarried, and has a disability that began before the end of the prescribed period. (Dkt. No. 9-
 2 at 35.) In Plaintiff’s case, the prescribed period ends seven years after her spouse’s death. (Dkt.
 No. 9-2 at 35.)

1 reviewing court conducts a *de novo* review of that portion. Fed. R. Civ. P. 72(b)(2) and -(3); 28
 2 U.S.C. § 636(b)(1)(C). After conducting the appropriate review, the court may “accept, reject, or
 3 modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28
 4 U.S.C. § 636(b)(1)(C).

5 **B. Objection: Evidentiary Weight of Dr. Marion’s Medical Opinion**

6 The R&R found that the ALJ erred when she placed little evidentiary weight on Dr.
 7 Marion’s medical opinion and reversed for this reason. (Dkt. No. 16 at 6.) Defendant objects to
 8 the magistrate judge’s reversal , arguing that the ALJ properly rejected Dr. Marion’s opinion.
 9 (Dkt. No. 17 at 1.) On the other hand, Plaintiff argues that the R&R properly reversed the ALJ’s
 10 erroneous ruling and that Dr. Marion’s opinion correctly identified Plaintiff’s disability.

11 The opinions of treating physicians are entitled to special weight and “if the ALJ chooses
 12 to disregard them, ‘[she] must set forth specific legitimate reasons for doing so, and this decision
 13 must itself be based on substantial evidence.’” *Embry v. Bowen*, 849 F.2d 418, 421 (9th Cir.
 14 1988) (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)). The Ninth Circuit is clear
 15 that “[t]he ALJ must do more than offer [her] conclusions.” *Id.* “Substantial evidence is more
 16 than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as
 17 adequate to support a conclusion.” *Consolidated Edison Co. of New York v. N.L.R.B.*, 305 U.S.
 18 197 (1938).

19 Here, the ALJ gave little weight to Dr. Marion’s opinion. The ALJ made two primary
 20 findings in support of its decision to discredit Dr. Marion’s opinion: (1) Dr. Marion’s opinion
 21 was inconsistent with his own review of medical records and the record as a whole; and (2) his
 22 opinion was not within the relevant period. (Dkt. No. 9-2 at 44–45.) The ALJ provided one
 23 example in support of these findings: “[Dr. Marion] noted that the claimant’s knee related issues
 24 were not extremely severe on x-rays or studies but the claimant’s subjective pain was limiting.
 25 Despite minimal objective evidence, he assessed severe limitations, which calls into question the
 26 reliability of his opinion.” (Dkt. No. 9-2 at 45.) Defendant argues that the ALJ was correct in

1 making these findings. (Dkt. No. 17.) The Court disagrees.

2 First, the ALJ's finding that Dr. Marion's opinion was internally inconsistent was not
3 supported by substantial evidence. It is true that Dr. Marion found Plaintiff's subjective pain to
4 be "quite severe and limiting" even though her disease was not "extremely" severe on x-rays.
5 (Dkt. 9-9 at 92–93.) But he also found that Plaintiff's mobility would still be limited even after
6 surgical intervention. (Dkt. 9-9 at 92–93.) Dr. Marion reached this conclusion based on his
7 physical examination, x-rays, and his medical expertise—this is not "minimal objective
8 evidence." (Dkt. No. 9-9 at 92–93.) Therefore, Dr. Marion's opinion was not internally
9 inconsistent.

10 Second, the ALJ's finding that Dr. Marion's opinion was outside the relevant period was
11 not supported by substantial evidence. Dr. Marion served as one of Plaintiff's treating physicians
12 before the relevant period began. (*See* Dkt. No. 9-7 at 12.) Additionally, Dr. Marion evaluated
13 Plaintiff for her knee pain during the relevant period. (Dkt. No. 9-8 at 131.) During the 2011
14 evaluation, Dr. Marion conducted a physical examination and reviewed x-rays, diagnosing
15 Plaintiff with bi-lateral chondromalacia patellae, x-ray confirmed lateral patellar facet narrowing,
16 crepitans on examination, and pain with patellar compression testing—the same diagnosis he
17 summarized in his opinion dated June 17, 2013. (Dkt. No. 9-8 at 131 and Dkt. No. 9-9 at 92.) It
18 is immaterial that Dr. Marion gave this later opinion after the relevant period, because it
19 summarized his opinion from *within* the relevant period. This is evident from his statement that
20 he reviewed Plaintiff's orthopedic medical records, which clearly span back to the relevant
21 period. (Dkt. No. 9-9 at 92.) Therefore, the ALJ should not have discounted Dr. Marion's
22 opinion for being outside of the relevant period.

23 Furthermore, the R&R correctly found that the ALJ's rejection of Dr. Marion's opinion
24 was not harmless error and resulted in an erroneous Residual Functional Capacity ("RFC")
25 determination that failed to account for all of Plaintiff's limitations. (Dkt. No. 16 at 6.) Because
26 the ALJ discounted Dr. Marion's testimony, she did not consider the limitations Dr. Marion

1 identified. Namely, that Plaintiff could never kneel or climb; that she could perform sedentary or
2 desk work only if she could “get up and move around for approximately 5 to 10 minutes every 1
3 to 2 hours or be able to sit with the knee extended or have an elevated chair where the knee was
4 bent less than 90 degrees”; and that Plaintiff could occasionally lift or carry no more than ten
5 pounds. (Dkt. No. 9-9 at 92.) This error resulted in the ALJ’s failure to pose hypothetical
6 questions to the vocational expert that included all of the claimant’s functional limitations
7 supported by the record. *Thomas v. Barnhart*, 278 F.3d 947, 956 (9th Cir. 2002) (noting that
8 hypothetical questions posed to a vocational expert “must include all of the claimant’s functional
9 limitations, both physical and mental supported by the record” (internal citation omitted)).

10 In sum, the ALJ’s failure to properly assess Dr. Marion’s opinions and incorporate them
11 into the hypothetical questions posed to the vocational expert constituted harmful error.

12 **III. CONCLUSION**

13 For the foregoing reasons, the R&R is ADOPTED (Dkt. No. 16) and this matter is
14 REMANDED for further administrative proceedings.

15 DATED this 21st day of April 2016.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE